No. 05-

IN THE

Supreme Court of the United States

DALE GARRISH, *et al.*,

Petitioners,

v.

UAW INTERNATIONAL UNION, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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ISSUES PRESENTED

The following two issues are presented:

1. The Sixth Circuit Court of Appeals decision that the statute of limitations period in plaintiffs' suit under 29 U.S.C. § 185 began to toll when their grievance was withdrawn by their union's representative rather than when plaintiffs exhausted, or attempted to exhaust their internal union remedies, is contrary to the Supreme Court holdings that require the statute of limitations period to be tolled during the time plaintiffs pursue their internal union remedies.

2. The Sixth Circuit Court of Appeals' determination that employees seeking to vindicate their rights to Fair Representation demonstrate that the internal union appeal procedures afford them some relief as condition to a Court's tolling of the six month statute of limitations improperly requires reliance upon employees' subjective beliefs, constitutes an unworkable standard which frustrates the National Labor Policy of encouraging workers to pursue internal union remedies while ensuring them a judicial forum in which to resolve disputes, and conflicts with the holdings of other Circuit Courts of Appeals.

PARTIES TO THE PROCEEDING

Petitioners

Dale Garrish, Gerald McDonald, James Adams, Frank Arold, Mitchell Atkinson, Janice A. Austin, Donald Bradford, Wayne Breece, David Carlock, Mark Castiglione, James Chrzanowski, Jimmie Clark, James Dexter, Ronald Dimity, Cheryl Eason, Gary Edwards, Ronald Estrada, Charles Frank, James Gerbig, Gary Gladki, Keith Goodrich, Randy Gossett, William Green, Russell Gregg, David Hall, Diane Hall, Kathleen Hodge, Catherine Holland, Robert Honeycutt, Robert Hudson, Randall Huff, Douglas Hutchinson, John Hutchinson, Kenneth Keesling, David Kettler, Ronald Kildow, Charles Mann, John Morell, John Moses, Rafael Moyet, Drinda Osborne, Eric Palmer, Ronald Rachfal, Robert Randolph, Lee Russell, David Shaw, Dennis Simoni, Michael Smith, Michael Sprague, James Stojsih, Robert Walrath, John Watt, and Allen Wrubel.

Respondents

International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America; Local 594 International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America; and General Motors Corporation.

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STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Labor Management Relations Act, 29 U.S.C. § 185.

STATEMENT OF THE CASE

Petitioners are 53 employees of General Motors Corporation ("GM") who are employed at GM's Pontiac, Michigan Truck Facility ("Pontiac Truck"). Petitioners are also members of the International Union United Automobile, Aerospace, and Agricultural Implement Workers of America – UAW ("UAW"), and its affiliate UAW Local 594 ("Local 594"). Petitioners work under a National Collective Bargaining Agreement ("CBA") to which GM and the UAW are parties. Petitioners also work under a Local Collective Bargaining Agreement to which GM's Pontiac Truck plant management ("GM Plant Management") and Local 594 are parties.

There are two sets of facts to this case. One relates to the improper hiring of relatives of UAW officials to skilled trades positions for which they were not qualified under the CBA. This hiring was a result of an 87 day strike in 1997 that was initiated by the UAW solely to force GM to hire

two relatives of UAW officials. In order to settle the strike GM caved into the UAW's demand, which was in violation of federal law and for which two UAW officials have been indicted by the United States Government.

The second set of facts relate to an admission in mid-2000 by one Local 594 official who said that in order to settle the strike GM paid him and all other Local 594 Bargaining Committee officials money to which they were not entitled.

a. ***The 87 Day Strike in 1997***

In 1995 the Chairman of Local 594 ("Jay Campbell"), directly and through Local 594's Skilled Trades Committeemen ("William Coffey"), notified GM's Pontiac Truck Plant Management that if GM would not agree to hire his son ("Gordon Campbell") into a skilled trades position, specifically the classification titled "Experimental Auto Product Engineering Layout & Assembly" ("Vehicle Builder"), that GM would have trouble getting a Local CBA in 1996, which was the date set for negotiating a new three year local agreement. GM's answer in 1995 was that the Chairman's son was not qualified under the requirements of the GM-UAW CBA, specifically Paragraph 178, and that it would not hire the Chairman's son.

As required by the UAW and GM, Local 594 and GM's Pontiac Truck Management began local negotiations in July 1996. As is the usual procedure in GM-UAW local negotiations, Local 594 submitted its demands to GM's Local Management. The number of demands exceeded 400, the demands ranged from additional manpower, to more fans, to various local agreements, etc. These demands were in addition to thousands of grievances that were not settled through the established grievance procedure of the CBA for the period of 1993 to 1996.

Local 594 refused to bargain in good faith for of the over 400 demands it submitted in July 1996, it settled, in one way or another, less than 100 demands during the following 10 months, which were July, August, September, October, November, and December 1996, and January, February, March, and April 1997. Local 594 began its strike after telling its members the strike was necessary to achieve legitimate local demands.

Throughout each of these ten months GM's records show that Local 594 officials repeatedly told GM Pontiac Truck Management that it would not get a settlement until it agreed to hire Gordon Campbell, the Chairman's son and Tod Fante, a relative of a Local 594 official.

Each time Local 594 insisted on the hiring of Gordon Campbell and Todd Fante. GM's answer was twofold; one was that neither of these individuals had the qualifications to be hired under the GM-UAW CBA; and the second was that GM would be violating federal law, The Labor Management Relations Act, § 302; 29 U.S.C. § 186.

The strike against GM, at Pontiac Truck, began on 23 April 1997 by almost 6,000 UAW members. Throughout the rest of April, all of May and until 30 June, Local 594 officials, with the full support of UAW officials, notably Donny Douglas, UAW International Representative, and his supervisor, UAW Vice-President Richard Shoemaker, continued to tell GM that the strike would not be settled until GM agreed to hire the sons of UAW officials, Gordon Campbell and Todd Fante. Each time the UAW insisted on the hiring of these relatives of UAW officials as a quid pro quo for the strike settlement, GM's answer was an emphatic no. GM continues to repeat that if GM would agree to the UAW's demands then GM would be violating the CBA and

it would be in violation of federal labor law, § 302, a criminal offense.

Nevertheless, on 30 June 1997, after sixty-eight days on strike, with the loss of over 700 million dollars in lost wages for its employees and a loss of over 75,000 trucks in its production schedule, GM relented and secretly agreed to hire Gordon Campbell and Todd Fante. About 16 days later, the strike ended. On 4 August 199[illegible] GM hired Gordon Campbell and Todd Fante. As explained below, Petitioners filed a grievance in protest of the hiring of Gordon Campbell and Todd Fante and demanded redress.

b. ***The Grievance Procedure***

The grievance procedure under the 1996 GM-UAW CBA is defined in paragraphs 28 through 45. Step one is the presentation of the grievance to the supervisor (Paragraphs 29 - 30). Step two is an appeal to Local 594's Shop Committee if the grievance is not settled at Step one. (Paragraphs 31 - 36). Step three is the appeal to GM and the UAW if the grievance is not settled at Step two. (Paragraphs 37 - 42). And Step four (the final step) is an appeal to the Impartial Umpire if the UAW chooses to appeal a specific grievance. (Paragraphs 43 - 45).

c. ***The Relevant Skilled Trades Provisions***

The relevant provisions of the 1996 CBA are the grievance procedure, Paragraph 178, which allows GM to hire someone who is a proven "journeyman" (for simplicity, the term "journeyman" includes women), that is someone who has completed an apprenticeship in a particular trade, or someone who has eight years of education and work

experience comparable to the eight years of education and work experience as defined in the GM-UAW CBA for GM employees who enter a skilled trades through an "in-house" training program, which appears in the CBA under the heading "Apprentice Uniform Shop Training Schedules and Related Training Schedules."

d. *The Grievance*

The CBA allows journeymen in any skilled trades classification to file a grievance in protest of the hiring of a "new hire" (that is, a non-GM individual) who those journeymen believe does not have the qualifications to be hired into that skilled trade classification. Petitioner Dale Garrish was the lead grievant of about 200 grievants who timely protested the hiring of Gordon Campbell and Todd Fante in Grievance Numbers C-00689 and C-00690.

Both grievances were withdrawn from the grievance procedure by Local 594 on 3 February 1999. Garrish, on behalf of all grievants timely filed an appeal with the UAW through the appeal procedure of the UAW's International Constitution, Article 33, protesting Local 594's withdrawal of the two grievances. Under the UAW's appeal procedure, the first step in Garrish's appeal was to Local 594's membership requesting that the membership order the reinstatement of the grievances. In November 1999 the membership of Local 594 denied Garrish's appeal as being untimely.

Garrish timely appealed the membership's decision to the UAW's President's office. In February 2000 the UAW's President's office reversed the membership's decision and ordered the membership to decide Garrish's appeal on the merits of the grievances. The membership then upheld Garrish's appeal and ordered Local 594 officials to reinstate the two grievances.

GM's Pontiac Truck Management correctly said it could not reinstate the grievances at the local level because the language of the CBA relating to the reinstatement of withdrawn grievances places that decision in the hands of the national parties, the Corporation and the International Union. Garrish then timely appealed to the UAW's International Executive Board ("IEB") demanding that the two grievances be reinstated by the national parties.

Garrish then received a letter from then UAW President Steven Yokich informing him that his timely appeal was being submitted to UAW Vice-President Richard Shoemaker for investigation and a decision on the merits of his appeal. At that point Garrish, along with about 140 other Local 594 members filed their lawsuit against the UAW, Local 594, and GM under 28 U.S.C. § 185. The lawsuit charged the UAW and Local 594 with Breach of the Duty of Fair Representation and with GM in Breach of contract.

c. ***Other Facts***

In 1998 a GM Pontiac Truck Labor Relations Representative ordered the removal of Gordon Campbell and Todd Fante from the Vehicle Builders Classification because they lacked the necessary qualifications under the CBA. Corporate GM management, UAW International Union officials, and Local 594 officials countermanded his order. Additionally, in a letter dated 27 February 1998, a UAW International Skilled Trades Representative denied Todd Fante's request for a journeyman's card. The reasons given were "Work records do not show eight (8) years at the trade."

During his deposition of 15 August 2001 Garrish stated that in 1999 he had doubts about whether pursuing the grievances that he and his co-workers filed could be fruitful. Nevertheless, Garrish's subjective belief was proven wrong

when a few months later, in February 2000, the UAW's President's office upheld his appeal. When Garrish knew for sure that his appeal would be futile was when UAW President Steven Yokich passed off his appeal to UAW Vice-President Richard Shoemaker; the same UAW official who approved his staff member, Donny Douglas, and the officials of Local 594, demand that GM hire Gordon Campbell and Todd Fante in direct violation of the CBA and in violation of federal labor law.

At that point Garrish and the other plaintiff's proceeded to file their Complaint in the U.S. District Court for the Eastern District of Michigan. When the Complaint was filed the charges included an allegation that in order to settle the strike Local 594 officials demanded money from GM for its Bargaining Officials. The records show this statement was made to Garrish by Local 594 Bargaining Committeeman Fitch. Thus, based on Fitch's statement, the allegation of GM payoffs to Local 594 Bargaining Officials was included in the law

While there were questions raised after the strike ended concerning grievance settlements for two Local 594 officials, the Chairman, Jay Campbell, and the Skilled Trades Committeeman William Coffey, those questions did not entail any belief that all of Local 594's Bargaining Officials were paid off in order to settle the strike. At all times, both Jay Campbell and Williams Coffey maintained that the monies they received were in payment of grievances they filed and those payments were legitimate. There was no proof to the contrary. The thrust of Petitioners' claim of payoffs went to Fitch's statement.

In a letter dated 17 January 2002, four and one/half years after Garrish filed his grievance, and one and one/half years

after the lawsuit was filed, Garrish received a letter from Vice-President Shoemaker's office notifying him that his appeal was denied on the merits. Garrish proceeded with his appeal even though his lawsuit was pending.

f. *The Courts Below*

The trial court issued its decision in an opinion and order dated 24 September 2003 dismissing the Garrish Complaint. The Sixth Circuit upheld the trial court with its decision of 5 August 2005

REASONS FOR GRANTING THE PETITION

One reason for granting the writ is the Court of Appeals decision is in direct conflict with this Court's many decisions that before a plaintiff can proceed to court in a claim of breach of contract and breach of the duty of fair representation, pursuant to 29 U.S.C. § 185, he, or she, must first exhaust their rights under the collective bargaining agreement and then to exhaust, or attempt to exhaust, their available internal union remedies. Thus, as long held by this Court, the limitations period is tolled during the time plaintiffs are exercising their rights through their collective bargaining grievance procedure and through their available internal union remedies. In this case the Court of Appeals held that the limitations period began to toll when their grievances were withdrawn rather than when plaintiffs were attempting to exhaust their internal union remedies. The Court of Appeals decision is in direct conflict with this Court implementation of National Labor Policy and if not reversed it will lead to a rush to court by plaintiffs without their waiting to exhaust, or attempting to exhaust, their internal union remedies.

A second reason for granting the writ is that National Labor Policy requires the adoption of a uniform and objective standard for determining when the six month statute of limitations period is tolled in a Duty of Fair Representation lawsuit filed pursuant to 29 U.S.C. § 185 while employees pursue their internal union remedies. In the present case the Sixth Circuit adopted a subjective standard based solely upon one statement by one plaintiff. There is a conflict among the Circuits. The Sixth Circuit's subjective standard is in conflict with the Seventh Circuit's adoption of an objective standard, which is followed by other Circuits. A uniform standard in determining when the six month limitations period is tolled is crucial to maintaining a rational National Labor Policy. Only this Court can establish a standard to be followed by all Circuits.

I. REVIEW IS WARRANTED DUE TO THE CIRCUIT COURT'S HOLDING THAT THE STATUTE OF LIMITATIONS BEGAN TO RUN WHEN PLAINTIFFS' GRIEVANCES WERE WITHDRAWN RATHER THAN AT THE TIME PLAINTIFFS EXHAUSTED, OR ATTEMPTED TO EXHAUST, THEIR INTERNAL UNION REMEDIES, A HOLDING THAT IS IN CONFLICT WITH SUPREME COURT HOLDINGS

In its decision the Court of Appeals held "The statute of limitations began to run no later than February 3, 1999, when Plaintiffs' grievances were withdrawn." (Appx. A, pg. 12a). Yet, all parties to this suit agree that immediately after the grievances were withdrawn Garrish, on behalf of the plaintiffs, timely filed an appeal through the UAW's Constitutional appeal procedure. This fact is not in dispute.

In *Clayton v. International Union - UAW*, 451 U.S. 679; 101 S. Ct. 2088, 68 L. Ed. 538 (1981), this Court held that

union members must exhaust their intra-union appeal rights prior to proceeding to court. This is what Garrish did and his internal union appeal was still waiting for a final decision through the UAW's appeal process at the time the trial court granted Defendants' motions for summary judgment on the basis plaintiffs should have filed their lawsuit within six months of the union's withdrawal of their grievance.

The trial court recognized the facts of Petitioners' internal union appeal in its detailed recitation of the sequence of the timely appeal steps taken by Garrish on behalf of himself and his fellow appellants. (Appx. B, pg. 31a - 32a). The last date noted by the trial court of Garrish's appeal still being in the hands of the UAW was 9 April 2003, about five and one/half years after the Garrish grievance was written, and nearly three years after the Complaint was filed in August 2000.

The *Clayton* holding followed a long line of cases, from the district courts, to the Courts of Appeals, to the Supreme Court mandating the exhaustion of internal union remedies prior to proceeding to court. *Vaca v. Sipes*, 386 U.S. 171, 87 S. Ct. 903, 17 L. Ed. 2d 842 (1967), in referring to *Republic Steel v. Maddox*, 379 U.S. 650, 85 S. Ct. 614, 13 L. Ed. 2d 580 (1965), held that before filing suit on a claim of a breach of the collective bargaining agreement the individual must first attempt to exhaust his, or her, contractual remedies. In subsequent decisions the courts have expanded the exhaustion requirement to include the exhaustion of internal union remedies prior to suing a union on a claim of the breach of the duty of fair representation.

A case in point is the statement that "Even when a union terminates the grievance process by voluntarily removing a union member's grievance before reaching arbitration, a union member must still challenge that union decision within the internal union appellate process under certain

circumstances before bringing an action against the union under § 301 of the LMRA." *Rutushin v. General Motors*, 575 F. Supp. 986 (1983), citing *Clayton, supra.* This is what Garrish did and after 36 months of no solution through the UAW's internal appellate process he filed suit.

This length of 36 months was not out of the ordinary for in one case involving the UAW the plaintiff waited 27 months while his internal union appeal hung in limbo before he filed suit. *Ruzicka v. General Motors and the International Union*, UAW, 523 F.2d 306 (6th Cir. 1975). The Sixth Circuit, in its *Ruzicka* decision, cited its decision in *Bsharah v. Eltra Corp.*, 394 F.2d 502 (6th Cir.) in stating "In *Bsharah* we affirmed the grant of summary judgment against an employee who had 'failed to allege or show any attempt to initiate her intra-Union remedies prescribed by the constitution and by-laws of the International Union.'" *Ruzicka*, 523 F.2d at 311.

The Sixth Circuit's decision in the present case is not only in conflict with Supreme Court decisions, but it is also in conflict with its own holdings. To use a colloquial expression, Garrish was faced with a "damned if you do and damned if you don't." In this case Garrish proceeded with his internal union appeal rights and Defendants GM and the UAW now argue that the limitations period had expired because he did not have to proceed with his internal union rights. But, had Garrish not exhausted, or at least tried to exhaust, his internal union remedies, then we can be sure that GM and the UAW would have argued that his limitations period expired since he did not proceed with this internal union remedies.

A. The Sixth Circuit's Decision Turns The Law On Its Head.

Other than the present case, Petitioners cannot find a single decision by a trial court, or a Court of Appeals, or the Supreme Court, pertaining to an employer and a union both arguing that plaintiff had to file his, or her lawsuit without proceeding with the union's internal appeal procedure. The Sixth Circuit's decision is treading on dangerous ground. If Petitioners' Writ of Certiorari is not granted so Petitioners can present their arguments why the Sixth Circuit's decision should be reversed then it will open the way for the setting of a precedent that will erode the established National Labor Policy that has worked so well for these many years.

As noted above, the UAW and GM want it both ways. In *Sobe v. Delco Electronics Div. of General Motors and the UAW International Union*, 830 F. 2d 83 (1987), a suit under 29 U.S.C. § 185, both GM and the UAW moved for summary judgment because "Ms. Sosbe failed to exhaust her internal union remedies." *Sosbe*, *supra*, at 85. Again, Petitioners urge the Court to grant their writ so they can present a full argument, based on the full record below.

One final case on this point. In *Miller v. General Motors and the International Union, UAW*, 513 F. Supp 748 (1981), the Court noted "In response to the complaint, all defendants now seek summary judgment based upon plaintiff's alleged failure to exhaust mandatory intra-union grievance procedures." *Miller*, *supra*, at 750. The Court went on to note "The exact appeals procedure available to plaintiff is set forth in the UAW Constitution, Article 33, Sections 1 - 12." *Miller*, *supra*, at 750.

Thus we have Defendant UAW defending its International Constitutional provisions requiring, in no uncertain terms, that all of its members comply with its

appellate provisions before proceeding to court. This UAW requirement is firmly stated in its International Constitution, Article 33, Section 5, which states as follows:

> OBLIGATION TO EXHAUST INTERNAL UNION REMEDIES. It shall be the duty of any individual or body, if aggrieved by any action, decision or penalty imposed, to exhaust fully the individual or body's remedy and all appeals under this Constitution and the rules of this Union before going to a civil court or governmental agency for redress. (UAW Const., 1998, pg. 99).

In concluding this part of Petitioners' writ, it should be noted that two of the UAW officials who Petitioners allege committed wrongdoing that adversely affected them during the 1997 strike have been indicted by the federal government on criminal charges relating to the same set of facts in Petitioners' civil suit.

II. REQUIRING EMPLOYEES SEEKING TO VINDICATE THEIR RIGHTS TO FAIR REPRESENTATION TO DEMONSTRATE THAT THE INTERNAL UNION APPEAL PROCEDURES AFFORD THEM SOME RELIEF AS CONDITION TO A COURT'S TOLLING OF THE SIX MONTH STATUTE OF LIMITATIONS IMPROPERLY REQUIRES RELIANCE UPON EMPLOYEES' SUBJECTIVE BELIEFS AND CONSTITUTES AN UNWORKABLE STANDARD WHICH FRUSTRATES THE NATIONAL LABOR POLICY OF ENCOURAGING WORKERS TO PURSUE INTERNAL UNION REMEDIES WHILE ENSURING THEM A JUDICIAL FORUM IN WHICH TO RESOLVE DISPUTES.

National Labor Policy requires the adoption of a uniform, objective standard for determining when the six month statute of limitations is tolled in a Duty of Fair Representation lawsuit (filed pursuant to 29 U.S.C. § 185) while employees pursue internal union remedies. The lower courts utilized the subjective, impractical holding set forth in *Robinson v. Central Brass Manufacturing Co.*, 1087 F.2d 1235 (6th Cir. 1993), rather than the analysis adopted by the Seventh Circuit in *Frandsen v. Broth. of Ry., Airline & S.S. Clerks*, 782 F.2d 674 (7th Cir. 1986). The *Robinson* rule should be abandoned in favor of the *Frandsen* (or similar) standard.

1. *Tolling The Six Month Statute Of Limitations While Employees Pursue Internal Union Procedures Constitutes An Objective, Practical Standard.*

The statute of limitations should be tolled for an employee who pursues union procedures that are ultimately determined to be futile. The Seventh Circuit established an

objective standard to determine when the six month statute of limitations is tolled in a Breach of the Duty of Fair Representation hybrid lawsuit filed under 29 U.S.C. § 185. The court recognized the dilemma facing employees:

> Should the statute of limitations be tolled where *Clayton* relieves the employee of the exhaustion requirement? The existence of this unresolved question leaves the injured employee with a dilemma. If the employee does not exhaust internal union remedies, it can be certain that the defendant union will argue that this requires dismissal of the action. On the other hand, if the employee does not pursue those remedies, he knows that the union will argue that exhaustion would have been futile, and therefore that the statute of limitations should not be tolled during the time it took the employee to exhaust. This is the "Catch 22" that *Frandsen* alleges he is caught in. He argues that under the district court's holding, if *Clayton* does not get him, *DelCostello* will.

Id at 681. The Seventh Circuit adopted a simple objective standard for determining when the statute of limitations is tolled, holding "that the *DelCostello* statute of limitations is tolled by the pursuit of internal union remedies, even when those remedies are ultimately determined to have been futile." *Id.*

On the other hand, the Sixth Circuit adopted a rule which requires district courts to analyze subjectively the futility of internal union remedies and determine whether internal union remedies provide some relief. *Robinson v. Central Brass Manufacturing Co.*, 1087 F.2d 1235, 1242 (6th Cir. 1993). Under *Robinson*, the statute of limitations is tolled while an

employee pursues internal union remedies, provided the internal union appeal must be able to afford the claimant some relief from the defendant. *Id.* No standards were developed in *Robinson* to determine what the phrase "some relief" meant. Nor did the court define what is meant by "completely futile" internal union remedies.

The *Frandsen* rule eliminates the requirement that plaintiffs make a subjective determination as to whether intra-union appeals may be futile. Prospective plaintiffs need not engage in a distasteful choice: should I follow internal union procedures which may be futile risking that some court will at some time in the future dismiss my lawsuit because the futile procedures terminated more than six months after the breach of the duty of fair representation, or should I file prior to the fulfillment of intra union procedures designed to resolve disputes privately and hazard dismissal for failure to exhaust.

The Seventh Circuit approach is consistent with this Court's decision in *Clayton v. UAW*, 451 U.S. 679, 69 L. Ed. 2d 538, 101 S. Ct. 2088 (1981). The *Frandsen* holding, that the statute of limitations is tolled in situations where even the intra-union remedies are ultimately determined to have been futile, encourages the pursuit of favored private processes. It relieves putative plaintiffs from having to rightly predict how a yet unknown judge will exercise his discretion to excuse exhaustion. *Clayton*, 451 U.S. at 681-84; *Stevens v. Northwest Indiana District Council*, 20 F.3d 720 (7th Cir. 1994).

Tolling the statute of limitations is particularly attractive in situations presented by the facts of this case. Plaintiffs, like the petitioners here, may receive mixed messages from a variety of sources regarding how certain events unfold in the collective bargaining process and why those events took place. Untenable credibility choices face potential duty of

fair representation plaintiffs unless the *Frandsen* rule is followed. The futility of further union appeals may not be clear to all or some plaintiffs because union officials well may be equivocal or contradictory in their communications to dissatisfied members. They may send such communications through persons within the internal union hierarchy whose authority to bind the union is at best hazy. *Albright v. International Brotherhood of Teamsters*, 273 F.3d 564 (3d Cir. 2001) (citations omitted). One court indicated that such a situation created a guessing game for plaintiffs:

> If, in reliance on what he thought were genuine internal remedies, he refrained from suing for as much as six months, and has ultimately determined that these remedies were illusory, his suit will be forever barred . . . To avoid this trap, employee plaintiffs will have to file numerous precautionary lawsuits . . . in hopes that perhaps one of the suits will have been timed correctly.

Scott v. Loc. 863, Int'l. Brotherhood of Teamsters, 725 F.2d 226, 231 (3d Cir. 1984). The uniform objective standard set forth in *Frandsen* abolishes such a predicament. If a union member follows internal union appeal procedures, the statute of limitations will be tolled pending the termination of the process.

Following the *Frandsen* holding also eliminates dilemmas for courts. Under the *Robinson* rule, courts are faced with the challenge of determining when the futility of appeals would or should have become clear to the plaintiffs thereby triggering the statute of limitations. The *Robinson* approach, which requires the difficult, if not impossible, determination as to when it becomes clear that further union appeals would be futile is "court inspired vagueness; courts are faced with the challenge of determining when the futility

of appeals was or should have become 'clear' to the plaintiffs, thereby triggering the statute of limitations." *Albright v. International Brotherhood of Teamsters*, 273 F.3d 564, 573 (3d Cir. 2001) (citations omitted). The Seventh Circuit approach eliminates this problem. Just as employees need not engage in complicated legal analysis, courts need not inquire into an employee's mindset or depth of knowledge and understanding of facts and rules, or make credibility judgments. The same straightforward rule is manageable by court and employee, alike. Thus a *Frandsen* standard should be adopted.

The lower courts' decisions in this case exemplify the impracticality of the "some relief" standard. The courts differentiated between categories of relief placing (nearly exclusive) emphasis on whether the internal appeals process could award monetary relief and discounting the availability of non-monetary relief available through the internal appeals process.

The standard utilized by the lower courts in this case (the *Robinson* rule) also demands that petitioners subjectively determine whether internal union procedures afford them "some relief" or whether one type of "relief" is greater than another or sufficient to toll the statute of limitations. Here, the removal of unqualified individuals and/or enforcement of journeyman qualification rules would have been beneficial to petitioners. In fact, this particular relief may have placated petitioners, thereby avoiding litigation. The internal appeal process need not provide complete or monetary relief in order to be fruitful to the prospective plaintiff or beneficial to the judicial system:

> [I]f partial relief is obtained, the marginal increase in relief obtained in litigation may not be worth the corresponding increase in expense and risk. The intra union grievance system may also

> persuade the member that a claim is not so strong as it might have seemed or may produce a genuine compromise. The pursuit of nonjudicial procedures may, if perceived as fair, have a conciliatory and therapeutic value that lessens the employee's perceived need to file suit.

Frandsen, 782 F.2d at 683. Requiring employees and courts to place greater value on certain categories of relief improperly emphasizes monetary relief over other important (and in some cases vital) work place issues.

Utilizing *Frandsen* type rules is consistent with approaches followed by many circuit and district courts[1] *Repstine v. Burlington Northern, Inc.*, 149 F.3d 1068 (10th Cir. 1998) *citing Lancaster v. Airline Pilots Ass'n Int'l*, 76 F.3d 1509, 1528 (10th Cir. 1996) *abrogated by Airline Pilots Assoc. v. Miller*, 523 U.S. 866, 188 S. Ct. 1761, 140 L. Ed. 2d 1070 (1998) and *Volkman v. United v. Transp. Union*, 73 F.3d 1047 (10th Cir. 1996) (If an objecting employee pursues his nonjudicial remedies in good faith, the limitations period is tolled until the nonjudicial proceedings are complete); *Walker v. Teamsters Local 71*, 714 F. Supp. 178 (W.D. N.C. 1989), *aff'd in part and rev'd in part on other grounds*, 930 F.2d 376 (4th Cir.), *cert. denied*, 502 U.S. 1004, 112 S. Ct. 636, 116 L. Ed. 2d 654 (1991) (any reasonable effort by plaintiffs, however futile, tolls the statute); *Ryder v. Phillip Morris*, 946 F. Supp. 422, 432 (E.D. Va. 1996).

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1. Other courts have adopted the *Robinson* or a similar rule. *See Lewis v. Int'l Brotherhood of Teamsters*, 826 F.2d 1310 (3rd Cir. 1987); *Barlow v. American Nat'l Can Co.*, 173 F.3d 640 (8th Cir. 1999); *Scalzov v. Insalaco's Markets*, 37 F. Supp.2d 376 (N.D. Pa. 1998).

2. *National Labor Policy Is Served By Tolling The Statute Of Limitations While Employees Pursue Internal Union Procedures.*

Adoption of a *Frandsen* type rule fulfills the National Labor Policy encouraging the self-governance of labor organizations through the development of internal procedures providing an avenue for redress of grievances for its members. *Dunleavy v. Local 1617, United Steelworkers of America*, 814 F.2d 1087, 1089 (6th Cir. 1987). Tolling the statute of limitations while members pursue internal union procedures strongly favors giving unions the opportunity to correct internal problems through self-regulation; unions are encouraged to be responsible for their own actions. *Id.* (citations omitted). Such a rule encourages the pursuit of favored private processes. *Stevens v. Northwest Indiana District Council*, 20 F.3d 720, 729 (7th Cir. 1994).

The encouragement of self-governance of labor organizations through the development of internal procedures which provide an avenue for the redress of grievances for union members carries greater magnitude than the policies favoring a swift and uniform resolution of labor disputes. *Dunleavy*, 814 F.2d at 1089. The policy of prompt resolution of labor disputes yields to the National Labor Policy of encouraging workers to pursue internal union remedies prior to filing suit.

The language contained within the UAW Constitution delineating a process for internal policy appeals provides further support for tolling the statute of limitations when an employee pursues internal union appeals, even if those union appeals ultimately are determined to be futile. Article 33 of the UAW Constitution contains a comprehensive process through which aggrieved union members may appeal decisions by their local and international unions which the

member believes are improper. In fact, Section 5 of Article 33 imposes a mandatory obligation on union members to exhaust the detailed procedures outlined in Article 33, stating:

> It shall be the duty of any individual or body, if aggrieved by any action, decision or penalty imposed, to exhaust fully the individual or body's remedy and all appeals under this constitution and rules of this union before going to a civil court or governmental agency for redress.

Tolling the statute of limitations gives meaning to procedures and union constitutions which contain provisions similar to those outlined in Section 5 of Article 33. Anything less creates exceptions which emasculate the exhaustion provisions.

Adoption of the *Robinson* rationale by the lower courts in this case penalized employees for faithful adherence to the [UAW] union constitution and national collective bargaining agreement. Application of the *Robinson* rule, by failing to toll the statute of limitations while petitioners pursued their mandatory internal remedies and appeals, unfairly penalized petitioners for exercising the rights and procedures guaranteed and mandated by the union's constitution and federal labor policy. Petitioners relentless pursuit of their internal remedies and appeals should be applauded, rather than rejected as a seemingly foolish folly of the rank and file.

When the statute of limitations should be tolled should not be confused with the related, yet different requirement that an employee exhaust her internal union appeals before seeking redress through a judicial forum. In *Clayton*, this court set forth the factors which a court may properly excuse exhaustion. 451 U.S. at 689, 101 S. Ct. at 2095. *Clayton* addresses when the exhaustion requirement may be excused,

i.e., futility. The doctrine gives unions the opportunity to correct internal problems through self-regulation. The exhaustion requirement does not foreclose an aggrieved employee's right to seek redress in the federal courts; it merely imposes upon the employee a duty to pursue internal union remedies before filing suit.

Unlike *Clayton*'s exhaustion rules, unless the statute of limitations is tolled while an employee pursues internal union remedies, employees are denied their opportunity for a federal forum. Just as *Clayton* encourages employees to utilize and unions to adopt internal union procedures, tolling the statute of limitations while employees pursue those remedies gives meaning to and provides legitimacy to the process. At the same time, aggrieved employees are not foreclosed of their right to seek judicial relief in the event of denial of their grievances regardless of whether one subjectively determines that those procedures are futile. Unless a *Frandsen* type rule is adopted, the tolling rules and exhaustion requirements will be inconsistent with one another.

CONCLUSION

For all the foregoing reasons, Petitioners respectfully request that the Supreme Court grant review of this matter.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT FILED AUGUST 5, 2005

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 03-2468

DALE GARRISH, et al.,

Plaintiffs-Appellants,

v.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE, AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA; LOCAL 594 INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE, AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA; AND GENERAL MOTORS CORPORATION,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Michigan at Flint.
No. 00-40291 – Paul V. Gadola, District Judge.

Argued: June 8, 2005 Decided and Filed: August 5, 2005

Before: SILER and GIBBONS, Circuit Judges;
WILLIAMS, District Judge.*

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* The Honorable Glen M. Williams, United States District Judge for the Western District of Virginia, sitting by designation.

Appendix A

OPINION

SILER, Circuit Judge. In this action brought under Section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185, Plaintiffs Dale Garrish, *et al.*,[1] appeal the district court's grant of summary judgment to Defendants International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America ("UAW"), its affiliated Local 594 ("Local 594"), and General Motors Corporation ("GMC"). The district court concluded that Plaintiffs' action was barred by the statute of limitations because they failed to timely bring their claims. Having concluded that Plaintiffs' allegations are untimely and fail to state a cause of action, we **AFFIRM**.

BACKGROUND

Plaintiffs are GMC employees who work in its Pontiac, Michigan Facility and members of UAW and Local 594.[2] GMC and UAW are parties to a National Collective Bargaining Agreement ("NCBA"), while Local 594 and the Facility are parties to a Local Collective Bargaining Agreement ("LCBA"). These two collective bargaining agreements govern the terms and conditions of Plaintiffs' employment. The NCBA specifically governs employment rights, including wages, hours of employment, and working conditions. The LCBA permits its parties to negotiate those matters not covered by the NCBA.

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1. As there are 140 plaintiffs, they are collectively referred to as "Plaintiffs." The four lead plaintiffs (and only fact witnesses) in this case are Dale Garrish, Gerald McDonald, Gene Austin, and Janice Austin.

2. The "union" refers to both the UAW and Local 594.

Appendix A

In early 1997, Local 594's Shop Committee renegotiated the LCBA between GMC management and the Facility. Jay Campbell was the Shop Committee Chairman in charge of the renegotiation and was assisted by Donny Douglas, a UAW International Representative assigned to UAW's GMC Department. These 1997 negotiations pertained to the settlement of specific written demands and grievances immaterial to this appeal. On April 23, 1997, Local 594's members began a strike at the Facility over these unresolved demands and grievances. This strike lasted eighty-seven days, finally ending in July 1997. Thereafter, Plaintiffs asserted that although GMC met Local 594's demands within the strike's first month, the union fraudulently prolonged the strike for two more months. Plaintiffs claimed that the union extended the strike to (1) require GMC to hire Gordon Campbell (Jay Campbell's son) and Todd Fante (a friend of Donny Douglas's son) and (2) obtain approximately $200,000 in payoffs from GMC to Local 594's upper-level officials.

When the strike began Gordon Campbell and Fante were neither GMC employees nor union members. On August 4, 1997, GMC hired Gordon Campbell and Fante as journeymen vehicle builders, i.e., in skilled trade positions. Pursuant to the NCBA, Plaintiffs insisted that the only way a non-GMC individual can be hired as a journeyman in a skilled trades classification is through either having become a journeyman by way of an apprentice program or having gained eight years of experience in that skilled trade. On August 19, 1997, Plaintiffs challenged the credentials of all new hires and demanded a complete investigation into Gordon Campbell's and Fante's credentials. On August 29, 1997, two additional grievances were charged against Gordon Campbell and Fante,

again challenging their credentials and claiming that they were wrongfully hired during the strike.[3]

All grievances against Gordon Campbell and Fante, however, were withdrawn by Skilled Trades Zoneman William Coffey in February 1999. On February 22, 1999, Garrish and other members of Local 594 (including some Plaintiffs) appealed the withdrawal of the grievances. On March 30, 1999, Plaintiffs' appeal was held "to be filed in an untimely manner in accordance with Article # 33 of the [UAW] International Constitution." On April 21, 1999, Garrish protested to Jay Campbell that the appeal was timely and must be heard. Jay Campbell never responded, so Garrish filed his appeal with the membership of Local 594. Although again considered untimely, on February 1, 2000, the membership ultimately concluded that the appeal was timely filed. Plaintiffs were very concerned that any internal appeal would be futile—Garrish opined that his "appeal has been delayed literally years under the guise of untimeliness."

Ultimately, on August 7, 2000, Plaintiffs filed this action against Defendants pursuant to § 301 of the LMRA, as amended 29 U.S.C. § 185, for breach of contract and the duty of fair representation. Plaintiffs sought the removal of Gordon Campbell and Fante from their skilled trade positions, as well as compensatory damages in lost wages for 5,000 employees during the prolonged strike and punitive damages from all Defendants. Plaintiffs also alleged that Local 594 extended the strike two more months than

3. Gordon Campbell and Fante are not parties to this appeal. *See Garrish v. Int'l Union, UAW*, 133 F.Supp.2d 959, 967 (E.D.Mich.2001).

necessary to force GMC to pay off upper-level Local 594 officials. In the meantime, GMC determined that under the NCBA only the UAW, and not any local union affiliate, may demand reinstatement of a grievance. Therefore, GMC concluded that Local 594's decision to withdraw the grievances challenging these two employees was reasonable and Local 594 was correct in deciding that an arbitrator would not uphold the grievance. While Garrish was advised that he could appeal this decision under Article 33 of the UAW Constitution, he (and other Plaintiffs) still did not believe that the UAW would properly consider an appeal.

After many other instances of procedural wrangling and several years after the grievances were originally filed, the district court granted Defendants' motion for summary judgment. It concluded that Plaintiffs' claims were barred by the statute of limitations because they failed to timely file their complaint.[4]

DISCUSSION

We review the district court's grant of summary judgment *de novo. Lautermilch v. Findlay City Sch.*, 314 F.3d 271, 274 (6th Cir.2003). "Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Id.; see* Fed.R.Civ.P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S.

4. The district court had previously construed Plaintiffs' complaint as a hybrid § 301 cause of action. *See Garrish*, 133 F.Supp.2d at 963-64. Moreover, Plaintiffs had also been denied class certification. *See Garrish v. Int'l Union, UAW*, 149 F.Supp.2d 326, 333 (E.D.Mich.2001).

242, 247-48, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). All evidence is viewed in the light most favorable to Plaintiffs. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

"A hybrid § 301 suit implicates the interrelationship among a union member, his union, and his employer." *Vencl v. Int'l Union of Operating Eng'rs, Local 18,* 137 F.3d 420, 424 (6th Cir.1998) (citation omitted). Jurisdiction arises under § 301 because Plaintiffs alleged breaches of the NCBA. *See id.* "To recover against a union under § 301, the union member must prove both (1) that the employer breached the collective bargaining agreement and (2) that the union breached its duty of fair representation." *Id.* (citation omitted). If both prongs are not satisfied, Plaintiffs cannot succeed against any Defendant. *See id.; Bagsby v. Lewis Bros. of Tennessee,* 820 F.2d 799, 801 (6th Cir.1987).

A six-month statute of limitations applies to Plaintiffs' hybrid § 301 action. *See Martin v. Lake County Sewer Co.,* 269 F.3d 673, 677 (6th Cir.2001) (citing *DelCostello v. Int'l Bhd. of Teamsters,* 462 U.S. 151, 169, 103 S.Ct. 2281, 76 L.Ed.2d 476 (1983)). "Such a claim accrues when an employee discovers, or should have discovered with exercise of due diligence, acts giving rise to the cause of action." *Wilson v. Int'l Bhd. of Teamsters,* 83 F.3d 747, 757 (6th Cir.1996). While "[T]he determination of the accrual date is an objective one: 'the asserted actual knowledge of the plaintiffs is not determinative if they did not act as reasonable persons and, in effect, closed their eyes to evident and objective facts concerning the accrual of their right to sue.'" *See Noble v. Chrysler Motors Corp., Jeep Div.,* 32 F.3d 997,

1000 (6th Cir.1994). Plaintiffs are "not required to sue on a hybrid claim until . . . [they] reasonably should know that the union has abandoned [their] claim." *Wilson*, 83 F.3d at 757. Plaintiffs filed their complaint on August 7, 2000; accordingly, it was timely filed only if their claims accrued after February 7, 2000. If Plaintiffs' claims accrued before then, their complaint is time-barred unless they did not discover, or could not have discovered through due diligence, that Defendants' acts causing the alleged injuries occurred prior to February 7, 2000.

Plaintiffs allege two counts in their hybrid § 301 claim: (1) GMC breached the NCBA by hiring Gordon Campbell and Fante and the union breached the duty of fair representation by protracting the strike until GMC agreed to hire them; and (2) GMC's purported payoffs to Local 594 officials were connected to the union's extension of the strike.

1. The hiring of Gordon Campbell and Todd Fante.

Plaintiffs first argue that their timely pursuit of internal union remedies (beginning with their August 1997 grievances) capable of affording them some relief tolled the statute of limitations. Before bringing a hybrid § 301 claim, an employee "first must exhaust any grievance . . . remedies provided in the collective-bargaining agreement." *Robinson v. Cent. Brass Mfg. Co.*, 987 F.2d 1235, 1239 (6th Cir.1993). But the statute of limitations period begins to run when a plaintiff knows that the union has withdrawn his grievance. *See Noble*, 32 F.3d at 1001-02. In *Robinson*, 987 F.2d at 1239, this court held that the statute of limitations is not tolled during the time an employee pursues internal union remedies

that are completely futile. Instead, "in order for the statute of limitations to be tolled, the internal union appeal must be able to afford [Plaintiffs] *some* relief from [Defendants]. . . . [W]hether to toll the limitations period is a question within the discretion of the district court." *Id.* "We review a district court's decision regarding equitable tolling for an abuse of discretion." *Truitt v. County of Wayne*, 148 F.3d 644, 648 (6th Cir.1998) (citation omitted). If Plaintiffs attempted in good faith to exhaust their internal union remedies before filing suit in federal district court, the statute of limitations may be tolled. *See Dunleavy v. Local 1617, United Steelworkers of Am.*, 814 F.2d 1087, 1090-91 (6th Cir.1987).

The record is saturated with evidence that Plaintiffs discovered, or should have discovered through due diligence, Defendants' acts giving rise to this action well before February 7, 2000. For instance, Garrish testified in his September 1997 deposition that Donny Douglas admitted that he delayed the strike's settlement so that Gordon Campbell and Fante would be hired. Garrish also testified that Local 594 kept its members on strike so that these two individuals would be hired. Next, Plaintiffs were aware of a leaflet describing how Douglas maintained that he prolonged the strike to get Gordon Campbell hired. Further, in June 1999, Plaintiff Janice Austin filed an unfair labor practice charge against the union with the National Labor Relations Board. She claimed that Local 594 prolonged the strike so that GMC would hire the union officials' relatives. Plaintiffs filed grievances as to these same employees in August 1997 and acknowledged that they knew the facts surrounding these individuals within days of their hiring date. Garrish expressly

testified that "[i]t was always the same thing [during the 1997 strike and negotiations]: the kids and money." Plaintiffs nevertheless contend that the statute of limitations was tolled.

Plaintiffs appealed their August 1997 grievances through February 2002.[5] According to Plaintiffs, all these grievances tolled the statute of limitations since they would provide "some relief." Despite this argument, however, Plaintiffs have repeatedly conceded that any appeal was futile. For instance, Count V of Plaintiffs' first amended complaint is labeled "USE OF DEFENDANT UAW'S APPEAL PROCEDURE WOULD BE FUTILE." Garrish testified that he knew early on that the union would not process his grievance and it would be futile to do so, and he was not surprised and "could have gambled everything" that the UAW would find his appeal untimely because of fraud and collusion between various union and GMC officials.[6]

The district court did not abuse its discretion in determining that the statute of limitations was not tolled

5. These grievances only concerned the hiring of Gordon Campbell and Fante and did not address the purported payoffs.

6. Garrish subsequently tried to recant his earlier deposition testimony in an affidavit wherein he averred that he "was wrong in [his] belief in 1999 that [his] appeal would not be properly pursued" and explained why he originally thought the UAW would not properly process his appeal. This cannot be used in considering whether summary judgment was proper. *See Jones v. Gen. Motors Corp.*, 939 F.2d 380, 385 (6th Cir.1991) ("[I]t is well settled that a plaintiff may not create a factual issue for the purpose of defeating a motion for summary judgment by filing an affidavit contradicting a statement the plaintiff made in a prior deposition.").

because Plaintiffs knew long before February 7, 2000 that all appeals would be completely futile. *Robinson* clearly applies and Plaintiffs' unfounded assertion that the statute of limitations should have been tolled "[s]ince there was some possibility of relief . . . in the internal union remedy" is not supported by the record. While Article 33 of the UAW constitution provides that "[i]t shall be the duty of any individual . . . to exhaust fully the individual['s] remedy and all appeals under this Constitution and the rules of this Union before going to a civil court . . . for redress[,]" Plaintiffs' grievances only pertained to Gordon Campbell and Fante and did not address the underlying purpose of the lawsuit—the recovery of monetary damages. Plaintiffs' first amended complaint reveals that the NCBA does not provide for the 60 days lost wages sought and "Plaintiffs have no administrative remedies in which to recover their 60 days lost wages due to the collusion and fraud of all Defendants on the violation of the [NCBA] regarding [Gordon] Campbell and Fante, and due to the collusion of fraud of Defendants . . . in wrongful payments to union officials."[7] Plaintiffs' grievances that Gordon Campbell and Fante be removed because they were unqualified for skilled trade positions are completely dissimilar to the "heart" of Plaintiffs' action that

7. In a subsequent affidavit, Garrish again tried to avoid his prior deposition testimony by claiming that he did not learn an appeal would be futile until August 2000, when his appeal was assigned to UAW Vice-President Richard Shoemaker. According to Garrish, Shoemaker would not properly consider Plaintiffs' appeal "since his son was another individual who was hired by GM[C] as a result of the 1997 strike" at the Facility. However, this use of an affidavit is unacceptable, *see Jones*, 939 F.2d at 385, and there is undisputable evidence that Plaintiffs knew long before February 7, 2000 that any appeal would be futile.

the union improperly prolonged the strike in order to secure employment for these individuals and payments for Union officials, and that GMC violated the NCBA by acquiescing in these demands in order to settle the strike.

Although Plaintiffs also sought the removal of Gordon Campbell and Fante through this lawsuit, they nonetheless asserted that the other issues could not be resolved through internal union procedures. While the removal of Gordon Campbell and Fante would constitute "some relief," Plaintiffs have made it clear that their pursuit of internal union appeals would have been completely futile. *See Robinson,* 987 F.2d at 1242 ("Tolling the statute of limitations while a claimant pursues *completely* futile internal union remedies does not serve the federal interests discussed in *DelCostello* and *Clayton [v. Int'l Union, UAW,* 451 U.S. 679, 101 S.Ct. 2088, 68 L.Ed.2d 538 (1981)] and is unfair to the defendant."). Moreover, Plaintiffs certainly cannot raise a genuine issue of material fact by relying on evidence that purportedly tolls the statute of limitations yet simultaneously acknowledge it is not even included in the record. Because Plaintiffs knew that no relief was available through an internal process, the statute of limitations was not tolled.[8] *See Darden v. Local 247, Int'l Bhd. of Teamsters,* 103 F.3d 129, 1996 WL 692095, at *2 (6th Cir.1996) (table) (*per curiam*).

Plaintiffs sought different remedies for different violations: internal union appeals to address the wrongful

8. Despite Plaintiffs' contention otherwise, we are not permitted to find "that the *Robinson* rule is unworkable" and "abandon" it. *See Beck v. Haik,* 377 F.3d 624, 635 (6th Cir.2004) (A "panel of this [c]ourt cannot overrule the decision of another panel.").

hire of Gordon Campbell and Fante and a federal civil suit to address the wrongful strike prolongation for lost wages and improper payoffs to union officials. The statute of limitations began to run no later than February 3, 1999, when Plaintiffs' grievances were withdrawn. *See Noble*, 32 F.3d at 1001. Plaintiffs' representations in their first amended complaint and deposition testimony, as well as the disconnect between the internal grievance appeals and this lawsuit, reveal that the district court correctly refused to toll the statute of limitations. Therefore, because Plaintiffs discovered the grounds for their hybrid § 301 action before February 7, 2000, their claim is barred by the six-month statute of limitations.

2. The alleged payoff of union officials.

Plaintiffs also argue that a question of fact exists as to when they discovered that the strike was prolonged so GMC would pay off union officials. Garrish insists that he did not learn this until mid-2000, when Local 594 Committeeman Mike Fitch told him that all union committeemen received money at the end of the strike. Despite these declarations in Garrish's subsequent affidavit, the record discloses that he knew in July 1997 that two union officials (Jay Campbell and William Coffey) had "receiv[ed] substantial money grievance settlements." Garrish attempts to resolve these discrepancies by contending that he did not learn *all* committeemen received $5,000 payoffs until July or August 2000.

Summary judgment was appropriate. Allegations of payoffs and strike prolongation began immediately after the 1997 strike ended. Plaintiff Gene Austin, the publisher of

union opposition newsletter *The Challenger,* informed fellow union members that he "could no longer sit back and watch as our members were being used as pawns by the officers at the hall to negotiate large settlements for themselves and get family members hired." Gene Austin also agreed during his deposition testimony that he learned in September 1997 that Local 594's negotiators had abused their bargaining power to get large payments for Jay Campbell and William Coffey. Plaintiff Gerald McDonald testified that an inference arose that these payments were improper and unfair because Jay Campbell and Coffey vigorously defended their receipt of these large payments at the strike's conclusion. Furthermore, Garrish testified that, beginning in late 1997, he was familiar with numerous leaflets questioning the validity of these payments and the specific amounts some union officials received. Garrish conceded that he was exposed to literature in 1999 that union officials "abus[ed] the bargaining table" to "get payoffs for union officials and jobs for unqualified relatives[.]"

The voluminous record is replete with examples of Plaintiffs' knowledge of these alleged payoffs years before February 7, 2000. Illustrations include the following: Gene Austin wrote that "[w]hat we do know as a Membership is that some of the top negotiators during our 87 day strike have filled their pockets[.]"; leaflets advised "LEARN HOW TO BARGAIN FOR PERSONAL GAIN, GET YOUR KIDS A GOOD JOB, AND A POCKET FULL OF MONEY TO BOOT. LEARN HOW ABUSE OF POWER CAN WORK FOR YOU AND YOUR FRIENDS[.] INSTRUCTOR JAY 'I'M WORTH MORE' CAMPBELL."; "IT WAS NOT A STRIKE IT WAS A PAYOFF," "Bill Campbell . . . got

$60,000. Jay Campbell ... got $40,000 and his kid an illegal job on skilled trades"; and Garrish testified that "[i]t was always the same thing: the kids and money." All of this evidence was available at least by 2000.

Moreover, there is no distinction between the terms "some" and "all" so as to create a genuine issue of material fact. Regardless of any $5,000 payments to Fitch and "all" other committeemen, Plaintiffs knew of these payoffs to other high-level union officials as early as 1997. *See Ratkosky v. United Transp. Union,* 843 F.2d 869, 873-74 (6th Cir.1988) (six-month statute of limitations began to run when plaintiffs "knew or should have known at that time that [the union] was unwilling to renegotiate the contract"). It is immaterial whether Garrish allegedly learned in mid-2000 that all committeemen received a payoff; rather, it is paramount that he (and the other Plaintiffs) knew in 1997 that the strike had been prolonged so high-level union officials would receive payoffs. *See Bernard Schoninger Shopping Ctrs., Ltd. v. J.P.S. Elastomerics, Corp.,* 102 F.3d 1173, 1178-79 (11th Cir.1997) (first reported series of problems starts statute of limitations running); *Allen v. United Food & Commercial Workers Int'l Union,* 43 F.3d 424, 427-28 (9th Cir.1994) (plaintiffs knew or should have known of union misconduct when they learned their benefits were effectively eliminated). Fitch's purported confession to Garrish that "all" committeemen received payoffs only supplemented Plaintiffs' collective knowledge.[9] This claim is also time-barred.

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9. Garrish's claim that he first learned of the alleged payoffs in mid-2000 is contradicted by Plaintiffs' first amended complaint, wherein it is asserted that the "first time Plaintiffs became aware of

(Cont'd)

3. Plaintiffs failed to state a cause of action under § 301.

As an additional rationale for affirmance, two of Plaintiffs' allegations may not be redressed pursuant to § 301. *See Jasany v. United States Postal Serv.*, 755 F.2d 1244, 1248 n. 1 (6th Cir.1985) (alternative grounds can support district court judgment). Neither the prolongation of a strike nor the payoffs constitutes a cause of action in the instant appeal—GMC did not breach the NCBA and the union did not breach its duty of fair representation. During oral argument Plaintiffs' counsel even conceded that there was no case on point providing the relief Plaintiffs seek. Although the hiring of unqualified employees is a viable claim under § 301, the only available remedy here would be that which Plaintiffs sought in their grievances. *See Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 570-71, 96 S.Ct. 1048, 47 L.Ed.2d 231 (1976). However, this claim is time-barred.

AFFIRMED.

(Cont'd)

the possibility that Local 594's officials were obtaining money from GM[C] to which they were not entitled was in the report of the President of Local 594 in the local's newspaper, the 'Champ,' *in late February 2000*" (emphasis added).

APPENDIX B — MEMORANDUM OPINION AND ORDER GRANTING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION DATED SEPTEMBER 24, 2003

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CIVIL CASE NO. 00-40291

HONORABLE PAUL V. GADOLA
U.S. DISTRICT JUDGE

DALE GARRISH, et al.,

Plaintiffs,

v.

UNITED AUTOMOBILE, AEROSPACE, AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, INTERNATIONAL UNION (UAW), UAW LOCAL 594, GENERAL MOTORS CORPORATION, a public corporation incorporated in the State of Delaware, GORDON CAMPBELL, and TODD FANTE, jointly and severally,

Defendants.

Appendix B

MEMORANDUM OPINION AND ORDER GRANTING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

Before the Court are motions for summary judgment filed by Defendant General Motors Corporation and Defendants UAW and UAW Local 594. Defendants seek summary judgment on the issue of the statute of limitations only. The Court heard oral argument on June 25, 2003. For reasons set forth below, the Court shall grant Defendants' motions.

I. BACKGROUND

Plaintiffs are employees of Defendant General Motors Corporation ("GM") at its Truck and Bus facility in Pontiac, Michigan ("GM Truck and Bus"). Plaintiffs are also members of Defendant United Automobile Aerospace and Agricultural Implement Workers of America, International Union ("UAW") and UAW Local 594 ("Local 594"), (collectively, the "Union"). Defendants UAW and GM are parties to a National Collective Bargaining Agreement ("NCBA"). The NCBA concerns Plaintiffs' employment rights, including wages, hours of employment, and working conditions. Defendant Local 594 and the facility are parties to a Local Collective Bargaining Agreement ("LCBA"), which allows them to negotiate matters not covered by the NCBA.

In early 1997, Local 594's Shop Committee was involved in renegotiating the LCBA with GM management at GM Truck and Bus. Directing Local 594's efforts in the renegotiation was the Chairman of the Shop Committee, Jay Campbell. Assisting Jay Campbell was Donny Douglas, an

employee of the UAW assigned to the UAW's GM Department. The 1997 negotiations involved the settlement of specific written demands and grievances.

On April 23, 1997, the members of Local 594 at GM Truck and Bus went on strike over these demands and grievances. The strike lasted 87 days, ending on July 21, 1997. Plaintiffs allege that, although GM met all legitimate demands of Local 594 within the strike's first month, Defendant unions fraudulently prolonged the strike for approximately two months for two reasons. First, Plaintiffs allege that the unions sought to obtain roughly $200,000 in "overtime" payments from GM to high-level officials of Local 594. Second, Plaintiffs allege that the unions sought to obtain employment at GM for two individuals, Gordon Campbell and Todd Fante. Plaintiffs allege that Gordon Campbell is the son of Shop Committee Chairman Jay Campbell and that Todd Fante is the son of a friend of UAW representative Donny Douglas.

According to Plaintiffs, GM ultimately paid $200,000 to Local 594 to be divided among its high-level union representatives. Plaintiffs allege that GM knew this payment was illegal, and that GM nonetheless provided the $200,000 as a means of paying the union leaders to end the strike. Allegedly, at least three members of Local 594's executive board shared in the disbursement of the improperly-obtained $200,000.

GM ultimately agreed to hire Gordon Campbell and Todd Fante as journeymen in skilled trades positions. Plaintiffs allege, however, that these individuals were not qualified

journeymen and that GM's agreement to hire them was a violation of the NCBA.[1]

Plaintiffs filed this action on August 7, 2000. Plaintiffs filed a First Amended Complaint on October 4, 2000 pursuant to Section 301 of the Labor Management Relations Act, as amended, 29 U.S.C. § 185 ("Section 301"). Plaintiffs assert the following counts in the First Amended Complaint. In Count I, Plaintiffs claim that all Defendants colluded in violation of the LMRA to violate Plaintiffs' contractual rights under the NCBA by arranging for the hiring of Todd Fante and Gordon Campbell. In Count II, Plaintiffs allege that Defendants UAW and Local 594 committed fraud and collusion in violation of the LMRA to extort the $200,000 "overtime" payment from GM. In Count III, Plaintiffs allege that Defendants UAW and Local 594, in violation of the LMRA, breached the duty of fair representation that they owed Plaintiffs by prolonging the strike in order to obtain employment for Todd Fante and Gordon Campbell.

In its order of March 7, 2001, the Court construed Plaintiffs' First Amended Complaint as asserting one "hybrid" cause of action under Section 301. *See Garrish v. UAW,* 133 F.Supp.2d 959, 964 (E.D.Mich.2001) (Gadola, J.). In its order of July 2, 2001, the Court denied without prejudice Plaintiffs' motion for class certification. *See Garrish v. UAW,* 149 F.Supp.2d 326, 333 (E.D.Mich.2001)

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1. GM disputes Plaintiffs' claim that a breach of the NCBA occurred when GM "agreed" to hire Fante and Campbell and maintains that no breach could have occurred until these individuals were actually hired.

(Gadola, J.). On July 31, 2002, the Court conducted a status conference with the parties regarding statute of limitations issues. This conference resulted in a stipulated order entered by the Court on August 9, 2002 permitting Defendants to file motions for summary judgment on the issue of the statute of limitations. Defendants filed such motions, and those motions are now before the Court.

II. LEGAL STANDARD

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Summary judgment is appropriate where the moving party demonstrates that there is no genuine issue of material fact as to the existence of an essential element of the nonmoving party's case on which the nonmoving party would bear the burden of proof at trial. *Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Martin v. Ohio Turnpike Commission,* 968 F.2d 606, 608 (6th Cir.1992).

In considering a motion for summary judgment, the Court must view the facts and draw all reasonable inferences therefrom in a light most favorable to the nonmoving party. *60 Ivy Street Corp. v. Alexander,* 822 F.2d 1432, 1435 (6th Cir.1987). The Court is not required or permitted, however, to judge the evidence or make findings of fact. *Id.* at 1435-36. The moving party has the burden of showing conclusively that no genuine issue of material fact exists. *Id.* at 1435.

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A fact is "material" for purposes of summary judgment where proof of that fact would have the effect of establishing or refuting an essential element of the cause of action or a defense advanced by the parties. *Kendall v. Hoover Co.*, 751 F.2d 171, 174 (6th Cir.1984). A dispute over a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Accordingly, where a reasonable jury could not find that the nonmoving party is entitled to a verdict, there is no genuine issue for trial and summary judgment is appropriate. *Id.; Feliciano v. City of Cleveland*, 988 F.2d 649, 654 (6th Cir.1993).

Once the moving party carries the initial burden of demonstrating that no genuine issues of material fact are in dispute, the burden shifts to the nonmoving party to present specific facts to prove that there is a genuine issue for trial. To create a genuine issue of material fact, the nonmoving party must present more than just some evidence of a disputed issue. As the United States Supreme Court has stated, "[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the [nonmoving party's] evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Anderson*, 477 U.S. at 249-50, 106 S.Ct. 2505 (citations omitted); *see Celotex*, 477 U.S. at 322-23, 106 S.Ct. 2548; *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

Consequently, the nonmoving party must do more than raise some doubt as to the existence of a fact; the nonmoving party must produce evidence that would be sufficient to require submission of the issue to the jury. *Lucas v. Leaseway Multi Transportation Service, Inc.*, 738 F.Supp. 214, 217 (E.D.Mich.1990), *aff'd*, 929 F.2d 701 (6th Cir.1991). "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Anderson*, 477 U.S. at 252, 106 S.Ct. 2505; *see Cox v. Kentucky Department of Transportation*, 53 F.3d 146, 150 (6th Cir.1995).

III. ANALYSIS

A. STATUTE OF LIMITATIONS IN HYBRID SECTION 301 SUITS

"A hybrid claim under § 301 has two elements: (1) that the employer violated the terms of a collective-bargaining agreement and (2) that the union breached its duty of fair representation." *Garrish*, 133 F.Supp.2d at 965 (citations omitted). In order to recover against either the employer or the union, a plaintiff in a hybrid Section 301 suit "must show that the [employer] breached the [collective bargaining] [a]greement *and* that the [u]nion breached its duty of fair representation." *Bagsby v. Lewis Bros., Inc.*, 820 F.2d 799, 801 (6th Cir.1987). Accordingly, "[u]nless [the plaintiff] demonstrates *both* violations, he can not succeed against either party." *Id.*

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A six month statute of limitations applies to hybrid Section 301 claims. *DelCostello v. Int'l Bhd. of Teamsters,* 462 U.S. 151, 169, 103 S.Ct. 2281, 76 L.Ed.2d 476 (1983); *Martin v. Lake County Sewer Co.,* 269 F.3d 673, 677 (6th Cir.2001); *Garrish,* 133 F.Supp.2d at 965. "Such a claim accrues when an employee discovers, or should have discovered with exercise of due diligence, acts giving rise to the cause of action." *Wilson v. Int'l Bhd. of Teamsters,* 83 F.3d 747, 757 (6th Cir.1996); *accord Martin,* 269 F.3d at 678-79. Moreover, "[t]he determination of the accrual date is an objective one: 'the asserted actual knowledge of the plaintiffs is not determinative if they did not act as reasonable persons and, in effect, closed their eyes to evident and objective facts concerning the accrual of their right to sue.' " *Noble v. Chrysler Motors Corp.,* 32 F.3d 997, 1000 (6th Cir.1994).

Defendants GM, the UAW, and Local 594 argue that they are entitled to summary judgment because Plaintiffs' suit is time barred. Plaintiffs filed this action on August 7, 2000. Therefore, Plaintiffs' suit was timely only if the claims accrued *after February 7, 2000.* In order to defeat Defendants' motions for summary judgment, Plaintiffs must adduce evidence from which a reasonable jury could conclude that they did not discover, or could not have discovered through the exercise of reasonable diligence, acts giving rise to the cause of action prior to February 7, 2000.

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B. WHETHER PLAINTIFFS KNEW OR SHOULD HAVE KNOW OF THE ACTS GIVING RISE TO THE CAUSE OF ACTION

In this Court's March 7, 2001 opinion and order, the Court framed two issues comprising Plaintiff's Section 301 claim. *First,* the Court noted that Plaintiffs allege that GM breached the NCBA by hiring Fante and Campbell and that Union officials breached their duty of fair representation by prolonging the 1997 strike until GM agreed to their hiring demands. *See Garrish* 133 F.Supp.2d at 964. *Second,* the Court noted that Plaintiffs alleged that GM's alleged payment of $200,000 was linked to the Union officials' alleged prolongation of the strike. *See id.* The Court noted, however, that it was not entirely clear whether Plaintiffs had in fact alleged that the $200,000 payment was a breach of contract. *See id.* at 964 n. 2.

In its motion, Defendant GM maintains that Plaintiffs have since conceded that the only alleged act constituting a breach of contract was GM's agreement to hire Todd Fante and Gordon Campbell. In support of this contention, GM cites a May 24, 2002 letter from Plaintiffs' counsel Harold Dunne in which Mr. Dunne wrote, "Any liability that GM may incur stems solely from the claim of the breach of the collective bargaining agreement relative to the hiring of Fante and Campbell" and "GM's liability for hiring Campbell and Fante is founded upon the grievances filed by Garrish, et al." (*See* GM Ex. 1, Ltr. from Harold Dunne, May 24, 2002.)

However, in Plaintiffs' April 25, 2003 response to the motions for summary judgment, Plaintiffs contend that there

are *two* separate acts which constitute their Section 301 suit. The first act cited by Plaintiffs is GM's hiring of Todd Fante and Gordon Campbell. The second act cited by Plaintiffs is GM's alleged payoff of Union officials.

Because it is unclear whether Plaintiffs in fact have conceded that GM's liability is limited to the hiring of Fante and Campbell, the Court will address the statute of limitations issue with respect to the predicate acts as framed by the Court in its March 7, 2000 order. Accordingly, the Court now addresses whether, prior to February 7, 2000, Plaintiffs discovered, or should have discovered through the exercise of due diligence, (1) that the Union prolonged the 1997 strike in order to force GM to hire Todd Fante and Gordon Campbell; and (2) that the Union demanded payments from GM and that GM made such payments.

1. The Hiring of Todd Fante and Gordon Campbell

There is no dispute that GM hired Todd Fante and Gordon Campbell as journeymen builders on or about August 4, 1997. Defendants GM, the UAW, and Local 594 maintain that Plaintiffs had actual and constructive knowledge of the hiring of Todd Fante and Gordon Campbell as early as August, 1997. Defendants support this contention with a multitude of documents in the form of newspapers, leaflets, petitions, and newsletters in an attempt to show that the hiring of Fante and Campbell was well publicized within Union and its membership at GM Truck and Bus beginning in August, 1997 and continuing through September, 1999. (*See* GM Br., pp. 9-14; Union Br., pp. 8-29.)

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First, Defendants note that lead Plaintiff Garrish[2] stated at his deposition that, at the September 14, 1997 membership meeting, Donny Douglas admitted that he had delayed settlement of the 1997 strike in order to get Fante and Campbell hired. (*See* GM Ex. 14, at 40.)

Second, Defendants cite a leaflet distributed by Suzanne Brown, which describes how Donny Douglas admitted at the September 14, 1997 membership meeting "that he held up the negotiations and kept us out on the picket lines in his effort to get Jay Campbell's boy hired into Engineering." (GM Ex. 13; Union Ex. 11.) The Union also notes that Plaintiff Garrish, in his deposition, admitted that there was a lot of talk about newsletters such as Brown's; Garrish stated that the allegations that Douglas had delayed the settlement of the strike "was a big topic." (GM Ex. 14, at 42.)

Third, Defendants cite a petition entitled "A Petition to Suspend International Servicing Representative Donny G. Douglas From His Assigned Responsibilities to Service Members of UAW Local 594, GM Truck & Bus-Pontiac," which was signed by between 500 and 2000 members of Local 594 and 73 Plaintiffs, including Plaintiff Garrish. (*See* GM Ex. 21.; Union Ex. 22; Garrish Dep. 56.) The petition states, in part: "The Independent Slate finds itself under attack from those same disgruntled members for it's [sic] misuse of the bargaining table during the '97 strike. Specifically, the Chairman of the Shop Committee and the Skilled Trades Zone Man receiving grievance settlements that

2. Plaintiffs have identified Dale Garrish, Gene Austin, Janice Austin, and Gerald McDonald as the "lead" plaintiffs in this suit and as the only fact witnesses.

exceeded the yearly incomes of some members and bargaining to get relatives hired who had been declared unsuitable by management." (GM Ex. 21.; Union Ex. 22; Garrish Dep. 56.)

Fourth, Defendants cite the April 1998 issue of *The Challenger,* an opposition newspaper published by lead Plaintiff Gene Austin. In the April 1998 issue, Plaintiff Austin questioned what had kept the members on strike so long, asking, "was it [Jay Campbell's] son being hired . . .?" (GM Ex. 24, Union Ex. 33, *The Challenger,* Vol. 1., No. 7. at 3.) Defendants note that *The Challenger* was widely distributed among the members of Local 594. (*See* GM Ex. 10, Gene Austin Dep. 217) (noting that "a couple thousand copies" of *The Challenger* were distributed in the plant; GM Ex. 11, Gerald McDonald Dep., (stating that he distributed between 75 and 100 copies of most if not all of the editions of *The Challenger*)).

Fifth, Defendants cite a November 1998 issue of *The Challenger,* in which lead Plaintiff Gene Austin writes: "What kept [the members] out [on strike] the extra months? . . . possibly Jay's son being hired as a skilled trade journeyman without the proper card?" (Union Ex. 36. at 3.)

Sixth, Defendants note that on June 6, 1999, lead Plaintiff Janice Austin filed an unfair labor practice charge against the Union with the National Labor Relations Board. In her unfair labor practice charge, Plaintiff Janice Austin alleged that the Union had breached its duty of fair representation during the 1997 strike by negotiating to get relatives of union officials hired. (*See* GM Ex. 45, 46.) The NLRB declined to

issue a complaint in the matter, finding in part that the charge was "untimely filed." (*See* GM Ex. 47; Union Ex. 1.)

In response, Plaintiffs admit that they "knew the facts of [Fante and Campbell's] wrongful hiring within days of their being hired." (Pl. Br. at 24.) Indeed, at oral argument, Plaintiffs' counsel stated at one point, "we agree with GM and the UAW, Plaintiffs knew well before August of 2000 of the facts giving rise to their Complaint. They knew that. That's why they filed a grievance in August of 1997." (Hrg. Tr. 68.) Thus, Plaintiffs assert that "Defendants' reliance on over 52 exhibits going to pro and con leaflets during the years 1998 and 1999[is] pointless." (Pl. Br. at 25.) Although Plaintiffs characterize the record evidence, outlined above, as "pointless," this evidence indicates quite strongly that Plaintiffs knew, or at least should have known through the exercise of reasonable diligence, that Union officials prolonged the strike in order to secure employment for Gordon Campbell and Todd Fante.

Rather than combat the record evidence, however, Plaintiffs stake their claim upon the fact that they filed grievances in August 1997. Plaintiffs argue that the filing of these grievances tolled the statute of limitations. Defendants assert that Plaintiffs' grievances were futile, and that the statute of limitations cannot be tolled while an employee pursues grievances that are completely futile. Defendants' premise their futility argument upon two primary contentions: (1) Plaintiffs knew or should have known that the Union was no longer adequately pursuing their grievances prior to February 7, 2000; and (2) Plaintiffs' grievances seek relief that is wholly irrelevant to their claims in this lawsuit.

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It is undisputed that members of Local 594 filed numerous grievances challenging the hiring of Fante and Campbell beginning in August, 1997. On August 5, 1997, Michael Fitch, a member of Local 594, filed Grievance No. D091556 challenging "the credentials and ability" of Fante and Campbell. (*See* GM Ex. 2.; Union Ex. 2.) On August 19, 1997, Dale Garrish, Gerald McDonald, and Gene Austin, three of the four lead Plaintiffs in this case, filed Grievance No. C006888, which states:

> We challenge credentials of all new hires in Auto Product Layout & Development Trade hired after Aug 1, 1997. We demand a complete open & honest investigation into their credentials & all not meeting Journeyman Requirements be removed.

(GM Ex. 3.) On August 29, 1997, Gene Austin filed two group grievances. Grievance No. C006889 states:

> We charge [management] with hiring Gordon Campbell a nonqualified [sic] journeyman. We demand a complete open & honest investigation into his credentials & if not meeting Journeyman requirements be removed.

(GM Ex. 4; Pl.Ex. 17, Attach. A.) Grievance No. C006890 states:

> We charge [management] with hiring Todd Fante a nonqualified [sic] Journeyman [.] We demand a complete open & honest investigation into his

credentials & if not meeting Journeyman Requirements be removed.

(GM Ex. 5; Pl.Ex. 17, Attach. A.)

GM contends that all of the grievances challenging the hiring of Fante and Campbell were withdrawn on February 6, 1998. GM supports this contention with a copy of a February 6, 1998 memorandum from Skilled Trades Zoneman Bill Coffey, in which Mr. Coffey wrote that he was "withdrawing without prejudice [Grievance No. D091556], and any and all such grievances which may have been written challenging" the hiring of Fante and Campbell. (GM Ex. 32.) GM also cites a January 10, 2001 affidavit by Plaintiff Dale Garrish in support of its argument that the grievances were withdrawn on February 6, 1998. (*See* GM Ex. 33, ¶ 15.) In paragraph 15 of the affidavit cited by GM, Plaintiff Garrish avers that "[b]oth grievances [Nos. C006889 and C006890] were withdrawn on 3 February 1999." (*See* GM Ex. 33, ¶ 15.) Plaintiffs contend that Grievance Nos. C006889 and C006890 were withdrawn by Zone Committeeman Dan Kell on February 3, 1999. (*See* Pl.Ex. 17, ¶ 13.) Viewing the evidence in the light most favorable to Plaintiffs, the Court presumes that Grievance Nos. C006889 and C006890 were withdrawn on February 3, 1999. Plaintiff Gerald McDonald testified at his deposition that Grievance No. C00688 had been withdrawn. (McDonald Dep. 56.) Although Plaintiff McDonald did not state the specific date that his grievance was withdrawn, his testimony implies that the withdrawal occurred sometime in 1999. (*See id.* (noting that he became "completely uninvolved" after the withdrawal of his grievance, and that he became involved again during the appeal toward the end of 1999).)

In any event, on February 23, 1999, Plaintiff Garrish appealed the withdrawn Grievance Nos. C006889 and C006890. (*See* Pl.Ex. 17, ¶ 15.) On March 30, 1999, Plaintiff Garrish's appeal was denied as untimely by Carl Forester, Vice-Chairman of the Local 594 Shop Committee. (*See* Pl.Ex. 17, ¶ 16.) On April 21, 1999, Plaintiff Garrish wrote a letter to Shop Chairman Jay Campbell indicating his intent to appeal to the membership of Local 594. (*See* Pl.Ex. 17, ¶ 17.) Plaintiff Garrish received no response from Jay Campbell. (*See* Pl.Ex. 17, ¶ 18.) On July 21, 1999, Plaintiff Garrish again appealed the withdrawal of the two grievances to the membership of Local 594. (*See* Pl.Ex. 17, ¶ 18; GM Ex. 39.) In a letter dated October 19, 1999, the Recording Secretary of Local 594, Marcus Hamilton, informed Plaintiff Garrish that his appeal was untimely but stated further that he could further appeal the withdrawal of his grievance at a November 7, 1999 membership meeting. (*See* Pl.Ex. 17, ¶ 19; GM Ex. 40.) The appeal was denied as untimely at the November 7, 1999 membership meeting. (*See* Pl.Ex. 17, ¶ 20.) On December 3, 1999, Plaintiff Garrish wrote a letter to UAW President Steven P. Yokich, appealing the membership's decision to the UAW's International Executive Board. (*See* Pl.Ex. 17, ¶ 20.)

In an undated letter, which references a February 1, 2000 hearing, Gary Bryner, Administrative Assistant to President Yokich determined that Plaintiff Garrish had filed a timely appeal. (*See* Pl.Ex. 17, ¶ 21.) On March 19, 2000, the membership of Local 594 voted in favor of approving Plaintiff Garrish's appeal. (*See* Pl.Ex. 17, ¶ 22.) Thus, on May 10, 2000, Plaintiff Garrish again wrote to President Yokich requesting that the International Executive Board

consider his appeal. (*See* Pl.Ex. 17, ¶ 22.) In a letter dated January 17, 2002, Willie Williams, Assistant Director of the UAW's GM Department, concluded, after analyzing the merits of Plaintiff Garrish's appeal, that the local union acted properly in withdrawing the grievances. (*See* Pl.Ex. 17, ¶ 25.) On February 5, 2002, Plaintiff Garrish appealed the decision of Mr. Williams to the International Executive Board, in care of President Yokich. (*See* Pl.Ex. 17, ¶ 26.) In a letter dated February 12, 2002, the President's office acknowledged receipt of Plaintiff Garrish's appeal. (*See* Pl.Ex. 17, ¶ 27.) As of the date of his affidavit, April 9, 2003, Plaintiff Garrish has not received a decision from the UAW President's office. (*See* Pl.Ex. 17, ¶ 28.)

Plaintiffs contend that the filing and appeal of these grievances tolled the statute of limitations. Defendants argue that Plaintiffs' grievances did not toll the statute of limitations because Plaintiffs knew or should have known that their grievances were futile. Defendants' argument is premised upon two primary contentions: (1) Plaintiffs knew or should have known that the Union was no longer adequately pursuing their grievances; and (2) Plaintiffs' claims in this lawsuit are beyond the scope of their grievances.

An employee must exhaust any grievance remedies provided under the collective bargaining agreement prior to bringing suit against an employer for a violation of that agreement. *See Robinson v. Central Brass Mfg. Co.*, 987 F.2d 1235, 1239 (6th Cir.1993). The statute of limitations begins to accrue when an employee had knowledge that the union has withdrawn his grievance. *See Moore v. UAW Local 598*, 33 Fed. Appx. 165, 167-68 (6th Cir.2002); *Noble*, 32 F.3d at

1001 ("[T]he latest date at which plaintiffs should have known of the union's breach was in 1988 when the union steward refused to pursue their claim."); *cf. Jones v. General Motors Corp.*, 939 F.2d 380, 384 (6th Cir.1991) ("A decision by a union not to arbitrate a claim has been held to constitute an event that could trigger a plaintiff's knowledge of the acts constituting the violation."). Moreover, the statute of limitations is not tolled while an employee pursues internal union remedies that are completely futile. *See Robinson*, 987 F.2d at 1242; *Howell v. General Motors Corp.*, 19 Fed.Appx. 163, 168, 2001 WL 856953 (6th Cir.2001) (same). Rather, "in order for the statute of limitations to be tolled, the internal union appeal must be able to afford the claimant *some* relief from the defendant." *Robinson*, 987 F.2d at 1242. Finally, Courts have recognized that the filing of an unfair labor practice charge triggers the statute of limitations. *See, e.g., Scott v. UAW*, 242 F.3d 837, 840 (8th Cir.2001); *Simmons v. Howard Univ.*, 157 F.3d 914, 916 (D.C.Cir.1998) ("An unbroken string of precedent supports the proposition that when a plaintiff accuses his union of a breach of the duty of fair representation in a charge filed with the NLRB, he has by then, as a matter of law, 'discovered' the grounds for his hybrid § 301 claim.").

Here, Plaintiffs have admitted that the pursuit of their grievances was futile. In their First Amended Complaint, Plaintiffs admit that the February 22, 1999 appeal of the withdrawal of their grievance was futile. (*See* Amend. Compl. ¶¶ 130-32.) Plaintiffs allege that "[t]he President's office of Defendant UAW referred Plaintiffs' appeal to UAW Vice-President Shoemaker," (*Id.* ¶ 132), the same person "who approved the violation of the National CBA," (*Id.* ¶ 135).

Moreover, at his August 15, 2001 deposition in this matter, Plaintiff Garrish admitted that the pursuit of his grievances was futile:

> Q. So early on it was known that the union was not going ahead and letting you process that grievance?
>
> A. Yes. . . .
>
> Q. Yeah. I assume you had that suspicion probably when you started filing the grievance, did you not?
>
> A. Uh-huh, yes. And they confirmed every step of the way for me.

(Garrish Dep. 200.)

Plaintiff Garrish also testified that he was not surprised that his appeal of the withdrawal of his grievance was denied as untimely, stating, "I could have bet on that. I could have gambled everything I owned on it." (Garrish Dep. 206.)

Plaintiff Garrish attempts to recant his prior admissions in an affidavit prepared on April 9, 2003 and submitted with Plaintiffs' response to Defendants' motions for summary judgment. In this affidavit, Plaintiff avers: "In my deposition by the UAW and GM, I stated that in 1999 I felt that the UAW would not properly process my appeal. Nevertheless, I processed my appeal in accordance with the UAW's Constitution, and what, I believed, as a layman, to have been

my obligations under federal law." (Pl.Ex. 17, ¶ 29.) Plaintiff further avers, "I was wrong in my belief in 1999 that my appeal would not be properly pursued by the President's office. Hence, I renewed my faith in my appeal receiving a just hearing and I continued with my appeal." (*Id.*, ¶ 32.) Although Plaintiff Garrish attempts through his affidavit to recant statements that he made during his deposition, "it is well settled that a plaintiff may not create a factual issue for the purpose of defeating a motion for summary judgment by filing an affidavit contradicting a statement the plaintiff made in a prior deposition." *Jones*, 939 F.2d at 385. Thus, the Court will disregard those statements in Plaintiff Garrish's affidavit that contradict his deposition testimony regarding the futility of the grievance process.

Thus, based upon allegations in the First Amended Complaint and the admissions of lead Plaintiff Garrish, the Court finds that Plaintiffs knew or should have known that the appeal of their August 1997 grievances was futile. Accordingly, the statute of limitations began to accrue as early as February 3, 1999, when the grievances were withdrawn, and Plaintiffs' subsequent attempts to appeal the withdrawal of those grievances did not toll the statute of limitations.

The limited scope of the grievances is further evidence that their filing did not toll the statute of limitations. As noted above, the August, 1997 grievances specifically challenged the qualifications of Gordon Campbell and Todd Fante and requested the removal of these individuals if in fact they were determined to be unqualified. In contrast, Plaintiffs admit in the First Amended Complaint that the National CBA's

grievance procedure does not provide a remedy for their claims in this lawsuit:

122. The National CBA does not allow for payment to Plaintiffs for the 60 days wages they lost due to the collusion and fraud of all Defendants in Defendant Local 594's demand that Defendant GM wrongfully hire Defendants Campbell and Fante.

123. Plaintiffs have no Administrative Remedies regarding the 60 days lost wages while unknowingly on strike for the purpose of forcing Defendant GM to violate the National CBA.

124. Plaintiffs did not file a grievance for 60 days lost wages due to the fraud and collusion between Defendants UAW, Local 594, and GM to pay monies to union officials.

125. The National CBA does not have a provision in its grievance procedure for the processing of grievances alleging collusion and fraud between the union and management for 60 days lost wages due to a strike over improper issues that were secretly discussed and settled between Defendants UAW, Local 594, and GM.

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126. Plaintiffs have no administrative remedies in which to recover their 60 days lost wages due to the collusion and fraud of all Defendants on the violation of the National CBA regarding Defendants Campbell and Fante, and due to the collusion and fraud of Defendants UAW, Local 594, and GM in wrongful payments to union officials.

* * * * * *

136. The final step of the internal union appeal procedure is to either the Public Review Board ("PRB") or to the Conventions Appeal Committee ("CAC"), but not to both.

137. Defendant UAW Constitution does not grant the PRB, or the CAC, the authority to review and decide claims of fraud and collusion between itself and Defendant GM where Plaintiffs lost wages due to that collusion and fraud.

138. Neither the PRB nor the CAC can grant Plaintiffs any monetary relief for the 60 days lost wages during the 1997 strike.

(Amend.Compl.¶¶ 122-26, 136-38.)

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Through these allegations in the First Amended Complaint, Plaintiffs admit that their August 1997 grievances do not address the subject matter of this lawsuit. Plaintiffs' allegations are confirmed by the affidavit of Dottie Jones, Administrative Assistant to UAW President Ron Gettelfinger. In her affidavit, which is offered in the Union's reply brief, Ms. Jones avers:

> [I]f the CAC or PRB were to grant Garrish's appeal, they would reinstate Grievance Nos. C006889 and C006890 in the contractual grievance procedure of the UAW-GM National Agreement, to seek the removal of Fante and Campbell from their GM jobs as skilled trades journeymen. Since, as [Willie] Williams found on behalf of the UAW National GM Department, none of the grievants were denied a skilled trades job or suffered any financial injury as a result of the hiring of Fante and Campbell, the CAC and the PRB would not award monetary damages or have any basis for doing so.

(Union Reply, Ex. 2, ¶ 8.)

In this lawsuit, Plaintiffs do seek the removal of Fante and Campbell from the skilled trades. (Amend.Compl.¶ 154.) Despite this similarity between the relief requested in the grievances and in the First Amended Complaint, the issues in this lawsuit are otherwise inapposite to the grievances. At the heart of this suit stand Plaintiffs' allegations that the Union improperly prolonged the strike in order to secure employment for Todd Fante and Gordon Campbell and

payments for Union officials, and that GM violated the NCBA by acquiescing in these demands in order to settle the strike. (*See* Amend. Compl. ¶ 157.) Plaintiffs allege that the prolongation of the strike caused members to lose 60 days of wages. (*See* Amend. Compl. ¶ 124). Plaintiffs seek $50,000,000 in compensatory damages, (Amend.Compl. ¶ 157), and $500,000,000 in punitive damages, (Amend.Compl.¶ 158), on behalf of 5,000 employees, (Amend.Compl.¶ 147).

The disconnect between Plaintiffs' August 1997 grievances and this lawsuit is manifest. Both seek the removal of Fante and Campbell from the skilled trades, but the similarities end there. Plaintiffs admit in the First Amended Complaint that the issues in this suit cannot be resolved through internal administrative channels. Plaintiffs admit that the relief they seek is beyond the scope of any internal administrative procedure. These admissions are confirmed by the affidavit of Dottie Jones. As noted above, "in order for the statute of limitations to be tolled, the internal union appeal must be able to afford the claimant *some* relief," and the statute of limitations is not tolled "while a claimant pursues *completely* futile internal union remedies." *Robinson*, 987 F.2d at 1242.

Here, Plaintiffs admit that their claims of strike prolongation and payoffs and request for lost wages and punitive damages could not be addressed through internal administrative channels. Thus, Plaintiffs' August 1997 grievances, which sought merely the removal of Fante and Campbell, were completely futile as to the claims in this lawsuit and did not toll the statute of limitations.

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As a final matter, the Court concludes that Plaintiff Janice Austin's filing of an unfair labor practice charge in June, 199[0] is further evidence that Plaintiffs discovered the grounds for this hybrid Section 301 action prior to February, 7, 2000.

For the foregoing reasons, the Court finds that there is no genuine issue of material fact concerning Defendants' contention that this suit is barred by the six month statute of limitations. The statute of limitations began to accrue as early as February 3, 1999, and Plaintiffs knew or should have known through the exercise of reasonable diligence of the acts comprising their allegations that the 1997 strike was prolonged to secure employment for Todd Fante and Gordon Campbell.

2. Alleged Payoffs of Union Officials

At the outset, GM contends that Plaintiffs' counsel has conceded that the alleged payoffs that Union officials received from GM during the strike did not constitute a breach of contract. (*See* GM Ex. 1., Ltr. from Harold Dunne, May 24, 2002.) As noted above, despite this apparent concession, Plaintiffs continued to pursue this claim in their response to the motions for summary judgment. For reasons set forth below, the Court finds that, even if the alleged payoffs are actionable in this Section 301 suit, Plaintiffs knew or should have known through the exercise of reasonable diligence that Union officials received such payments and that Union officials prolonged the strike in order to obtain such payments.

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Defendants argue that Plaintiffs had knowledge of the alleged improper payments as early as August, 1997 and that knowledge of such payments was widespread no later than January, 1998. In response, Plaintiffs contend that they could not have known of such improper payments until at least the middle of 2000. In support of their argument, Defendants cite the leaflet distributed by Local 594 member Suzanne Brown in September or October, 1997, in which Ms. Brown wrote: "Jay Campbell bragged about the fact that he wrote a grievance for himself for $40,000 because he deserved it! . . . Bill Coffey received $60,000, because he deserved it!" (GM Ex. 13, Suzanne Brown Leaflet.) Defendants also cite the January, 1998 petition circulated among members of Local 594 that asserted that Shop Committee Chairman Jay Campbell and Skilled Trades Zone Man Bill Coffey had "misuse[d] the bargaining table during the '97 strike . . . [by] receiving grievance settlements that exceeded the yearly incomes of some members . . ." (GM Ex. 21.) Defendants note that between 500 and 2000 members of Local 594 signed this petition and that at least 72 Plaintiffs signed the petition. (*See* GM Br. at 14; Union Br. at 16-17.)

In their response, Plaintiffs offer the deposition of Plaintiff Garrish. In his affidavit, Plaintiff Garrish avers that he was informed by Local 594 Committeeman Mike Fitch in either late July or early August 2000 that all Committeemen were paid $5,000 during the strike. (Pl.Ex. 17, Garrish Aff., ¶ 41.) Garrish also avers that, "[p]rior to Fitch's statement, I knew that Jay Campbell received about $40,000 in a grievance settlement, Bill Coffey received about $60,000 in a grievance settlement, and John Kolton received about $15,000 in a grievance settlement." (Pl.Ex. 17, Garrish Aff.,

¶ 43.) Garrish also states that although he was aware of numerous leaflets distributed from late 1997 to mid-2000 questioning the validity of such payments, all three of these Union officials continued to assert that the grievance settlements were valid. (Pl.Ex. 17, Garrish Aff., ¶ 44.) Finally, Garrish avers that "I had no reason to believe that all Committeemen received improper payments from GM for their actions during the 1997 strike until Fitch told me that 'all Committeemen' received payments from GM at the end of the strike." (Pl.Ex. 17, Garrish Aff., ¶ 45.)

In reply, Defendants note that Garrish has admitted that he was aware of the payments made to Jay Campbell, Bill Coffey, and John Kolton. Thus, Defendants argue, the fact that Garrish was allegedly unaware of *all* of the allegedly wrongful payments does not stop the running of the statute of limitations. Next, Defendants argue that the overwhelming evidence in the form of leaflets and other documents distributed from 1997 through 2000 provide sufficient evidence from which the Court can conclude that, with the exercise of reasonable diligence, Plaintiffs should have known of the allegedly wrongful payments prior to February 7, 2000.

On balance, although Garrish's affidavit establishes that he did not know about the $5,000 payments to Mike Fitch and other Committeemen until July, 2000, he did know of the payments to other high level officials, *i.e.*, Jay Campbell, prior to July, 2000. Moreover, the evidence offered by Defendants in the form of leaflets and other documentation suggests that allegations of improper "payoffs" were widely known as early as September, 1997. *Cf. Bernard Schoninger*

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Shopping Ctrs. Ltd. v. J.P.S. Elastomerics, Corp., 102 F.3d 1173, 1178-79 (11th Cir.1997) (finding that knowledge of the first of a series of events triggers the statute limitations as to later occurring but related events). For these reasons, the Court finds that there is no genuine issue of material fact concerning Defendants' contention that Plaintiffs either knew, or should have known through the exercise of reasonable diligence, of the alleged payoffs made to Union officials prior to February 7, 2000.

C. The Affidavit of Gerald McDonald

In its March 7, 2001 order, this Court denied without prejudice the motion for summary judgment filed by Defendants UAW, Local 594, Fante and Campbell, pending the close of discovery. However, the Court noted that lead Plaintiff Gerald McDonald had adduced evidence from which a reasonable jury could conclude that it was not until July, 2000 that he knew, or had reason to know, that union officials had prolonged the strike in order to obtain employment for Fante and Campbell, *or* that union officials had prolonged the strike in order to obtain payoffs. *See Garrish*, 133 F.Supp.2d at 966. Specifically, the Court relied upon Mr. McDonald's January 10, 2001 affidavit, in which he

> state[ed] specifically that he was unaware of either allegation, and implies that he had no reason to be aware of either allegation because (1) "it was never reported at any Local 594 membership meeting" that the strike was prolonged to help Messrs. Fante and Campbell and (2) rumors of the $200,000 payment did not disseminate until a

union official admitted to accepting a payment in the summer of 2000. (Aff. of Gerald McDonald, ¶¶ 11, 17-19.)

Garrish, 133 F.Supp.2d at 966.

On August 16, 2001, Defendants deposed Mr. McDonald. In their current motions for summary judgment, Defendants contend that Mr. McDonald contradicted his *796 January 10, 2001 affidavit at his deposition and that the Court therefore should disregard Mr. McDonald's prior affidavit. For the following reasons, the Court agrees.

At his August 16, 2001 deposition, Mr. McDonald indicated that he was aware of the allegations of wrongdoing as early as 1997. For example, McDonald acknowledged that, after returning to work following the strike, the membership had serious questions about how two allegedly unqualified journeymen received jobs and why union officials received large grievance payoffs. (McDonald Dep. 54.) McDonald specifically acknowledged that the questions that arose after the strike concerned the journeymen jobs for Todd Fante and Gordon Campbell and the grievance payments to Bill Coffey and Jay Campbell. (McDonald Dep. 55.) McDonald confirmed that he had heard about these issues around July and August of 1997. (McDonald Dep. 55-56.) McDonald admitted that by September 1997, the hiring of Gordon Campbell and Todd Fante was a source of controversy in part because these individuals were related to members of the Independent Slate. (McDonald Dep. 16-17.)

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McDonald testified that he heard Jay Campbell and Bill Coffey defending the grievance settlements that they had received out of the 1997 strike. (McDonald Dep. 38-39.) McDonald acknowledged that members were questioning the propriety of the grievance settlements received by union negotiators, stating:

> No one was suggesting they did not have a right to those payments. They were saying that it's peculiar that they got such big lump sums for a long strike that seemed to produce little else. . . . [T]hat's a lot of money, don't you think? It seems to me that that is an awful lot of overtime for two people to be getting, two people who are in a position—I mean, if I had a grievance and it was worth $60,000 and I wasn't at the bargaining table, there's not a chance in hell of me getting it.

(McDonald Dep. 39-40.)

McDonald acknowledged that it was "entirely possible" that union negotiators might have traded off something in order to obtain their large grievances settlements. (McDonald Dep. 40.) McDonald testified that the fact that Jay Campbell and Bill Coffey "came out so defensively [about their grievance settlements] only lent itself to some sense of impropriety." (McDonald Dep. 41.) McDonald testified that his "take" on the negotiators' defensiveness about their grievance settlements indicated that they had done something wrong. (McDonald Dep. 41.) McDonald acknowledged that he heard the defense of Campbell and Coffey's grievance settlements at the September 14, 1997 membership meeting. (McDonald Dep. 41.)

McDonald also testified that he had read and distributed most if not all of the editions of *The Challenger* in 1997, 1998, and 1999. (McDonald Dep. 58-59, 65.) As noted above, *The Challenger* was an opposition newsletter by lead Plaintiff Gene Austin that directly questioned whether the members had been kept on strike so that Jay Campbell could secure employment for his son, Gordon Campbell. (*See* Union Ex. 33.) In the September 1997 issue of *The Challenger,* a letter questioned whether Bill Coffey had received a large grievance payoff. (Union Ex. 10 at 7.)

McDonald admitted that he signed the 1998 petition to remove Don Douglas. (McDonald Dep. 75-76.) As noted above, this petition alleged that the Chairman of the Shop Committee and the Skilled Trades Zone Man had "misuse[d] . . . the bargaining table during the '97 strike" in order to "receiv[e] grievance settlements that exceeded the yearly incomes of some members" and had "bargain[ed] to get relatives hired who had been declared unsuitable by management." (GM Ex. 21.; Union Ex. 22.)

The Court finds that the foregoing excerpts of Mr. McDonald's deposition testimony in many respects contradict Mr. McDonald's prior affidavit, relied upon by the Court in its March 7, 2001 order denying Defendant's motion for summary judgment without prejudice. Mr. McDonald's deposition testimony strongly indicates either that he knew, or at least should have known through the exercise of reasonable diligence, of the allegations relating to the hiring of Fante and Campbell and the payoffs received by union officials long before February 7, 2000. Accordingly, based upon subsequent discovery, and

specifically Mr. McDonald's deposition testimony, the Court shall disregard Mr. McDonald's June 10, 2001 affidavit and finds that affidavit insufficient to create an issue of fact for the jury. *Cf. Jones,* 939 F.2d at 385 ("[I]t is well settled that a plaintiff may not create a factual issue for the purpose of defeating a motion for summary judgment by filing an affidavit contradicting a statement the plaintiff made in a prior deposition.").

D. The Deposition of Jay Campbell

Plaintiffs deposed Jay Campbell on February 18, 2003. Mr. Campbell, who is currently under indictment, exercised his Fifth Amendment privilege in response to virtually every substantive question posed by Plaintiffs' counsel at the deposition. Plaintiffs argue that, despite the fact that Mr. Campbell did not provide any substantive answers, the Court may draw adverse inferences against Defendants based upon Mr. Campbell's "non-answers."

The Second Circuit has outlined several non-exclusive factors that a court should consider when deciding whether to draw adverse inferences from a non-party's invocation of the Fifth Amendment privilege against self-incrimination in the course of civil litigation:

> 1. *The Nature of the Relevant Relationships:* While no particular relationship governs, the nature of the relationship will invariably be the most significant circumstance. It should be examined, however, from the perspective of a non-party witness' loyalty to the plaintiff or defendant,

as the case may be. The closer the bond, whether by reason of blood, friendship or business, the less likely the non-party witness would be to render testimony in order to damage the relationship.

2. *The Degree of Control of the Party Over the Non-Party Witness:* The degree of control which the party has vested in the non-party witness in regard to the key facts and general subject matter of the litigation will likely inform the trial court whether the assertion of the privilege should be viewed as akin to testimony approaching admissibility under Fed.R.Evid. 801(d)(2), and may accordingly be viewed ... as a vicarious admission.

3. *The Compatibility of the Interests of the Party and Non-Party Witness in the Outcome of the Litigation:* The trial court should evaluate whether the non-party witness is pragmatically a noncaptioned party in interest and whether the assertion of the privilege advances the interests of both the non-party witness and the affected party in the outcome of the litigation.

4. *The Role of the Non-Party Witness in the Litigation:* Whether the non-party witness was a key figure in the litigation and played a controlling role in respect to any of its underlying aspects also logically merits consideration by the trial court.

LiButti v. United States, 107 F.3d 110, 123-24 (2d Cir.1997).

While consideration of the above factors is important, "the overarching concern is fundamentally whether the adverse inference is trustworthy under all of the circumstances and will advance the search for the truth." *Id.* at 124.

Analyzing the present situation under the first two factors, nature of the relationships and degree of control, it is not clear whether the Court should draw adverse inferences against Defendants GM and the Union. First, there is a difference in Campbell's former relationship with each of the Defendants. Obviously, as a former union official, Campbell's interests were often at odds with GM's interests. Moreover, GM did not exercise control over Campbell. On the other hand, Campbell was a Union official and thus had a direct relationship with the Union.

The third factor, compatibility of interests, favors the conclusion that adverse inferences should be drawn from Campbell's invocation of the privilege. It is clear that Campbell has an interest in the dismissal of this lawsuit, as the ultimate issues of liability involve his allegedly wrongful conduct. Moreover, under the fourth a factor, it is clear that Jay Campbell was a key figure in the underlying facts of this lawsuit.

Accordingly, on balance, the above factors tend to favor the drawing of adverse inferences against Defendants based upon Jay Campbell's invocation of the Fifth Amendment privilege against self-incrimination. *However,* even if the Court were to draw such inferences, the Court concludes that Plaintiffs' reliance upon such inferences, without more, will

not save them from summary judgment on the statute of limitations issue.

The vast majority of the questions put to Jay Campbell at his deposition do not implicate the statute of limitations. Many of the "inferences" that Plaintiffs request are pure legal conclusions, such as that Plaintiff Garrish's grievances were timely. The most powerful inferences that Plaintiffs could hope to draw from the deposition of Jay Campbell are (1) that Jay Campbell concealed from the membership the facts that he had prolonged the strike in order to obtain employment for his son and to obtain payments from GM; and (2) that the membership had reason to believe that Jay Campbell's denials of allegations of such conduct were trustworthy. These inferences, however, do not overcome the overwhelming evidence that Plaintiffs knew, or should have known through the exercise of reasonable diligence, of the acts giving rise to their cause of action prior to February 7, 2000. For these reasons, the Court finds Jay Campbell's deposition testimony of little if any value to the issues now before the Court. This testimony is insufficient to create an issue of fact for trial.

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IV. CONCLUSION

Accordingly, this Court being fully advised in the premises,

IT IS HEREBY ORDERED that Defendants' motions for summary judgment on the statute of limitations issue [docket entries 87 & 91] are **GRANTED** and this case is dismissed.

SO ORDERED.

Dated: [illegible]

s/ Paul V. Gadola
PAUL V. GADOLA
UNITED STATES DISTRICT JUDGE